

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7019

To be argued by
ALAN R. WENTZEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

PAUL G. GARRITY,

Plaintiff,

and

GARRITY INDUSTRIES, INC.,

*Plaintiff-Appellant,
Cross-Appellee,*

—against—

SOCIETE LES PILES WONDER,

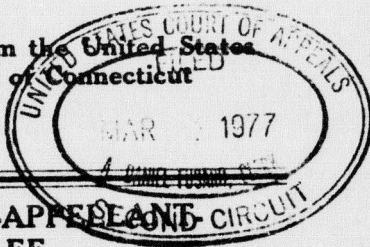
*Defendant-Appellee,
Cross-Appellant,*

and

WONDER CORPORATION OF AMERICA,

Defendant.

**On Appeal and Cross-Appeal from the United States
District Court for the District of Connecticut**



**BRIEF FOR PLAINTIFF-APPELLANT
CROSS-APPELLEE**

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On Appeal and Cross-Appeal from the United States
District Court for the District of Connecticut

**BRIEF FOR PLAINTIFF-APPELLANT-
CROSS-APPELLEE**

Issues Presented for Review

- I Did the District Court err in awarding Societe Les Piles Wonder pre-judgment interest on \$133,446.32, the full amount of the purchase price, in light of its judgment on only the balance of \$30,057.10 found due after deduction of the damages of Garrity Industries, Inc. for breach of warranty?
- II Did the District Court abuse its discretion in awarding pre-judgment interest in this case?

Preliminary Statement

This is an appeal by plaintiff, Garrity Industries, Inc. ("Garrity"), from so much of a judgment on a jury verdict of the United States District Court for the District of Connecticut (Murphy, J., sitting by designation), entered October 21, 1976, as awarded defendant, Societe Les Piles Wonder ("Piles Wonder"), pre-judgment interest on the sum of \$133,446.32; and from the order signed by Judge Murphy on December 13, 1976, denying Garrity's motion to alter or amend the judgment to exclude such interest.

Statement of the Case

The action was commenced by Garrity and its president, Paul G. Garrity, against Piles Wonder and its subsidiary, Wonder Corporation of America, on November 28, 1973. By pre-trial stipulation, filed September 13, 1976, the issues were limited to a claim by Garrity against Piles Wonder for breach of warranty arising from the sale of defective goods, and a counterclaim by Piles Wonder for the purchase price of the goods and for certain expenses (A3, 20, 41).^{*} The trial was held before Judge Thomas F.

^{*} References to "A" are to pages of the Joint Appendix.

Murphy and a jury on October 14, 15 and 18, 1976, and resulted in a verdict in favor of Garrity in the amount of \$105,900.00 as damages for breach of warranty, and a directed verdict for Piles Wonder in the amount of \$133,446.32, representing the purchase price of the goods, plus an amount of \$2,510.78 which arose from a monetary conversion error, leaving a net balance owed by Garrity to Piles Wonder of \$30,057.10. However, the District Court then awarded Piles Wonder pre-judgment interest at the rate of 6% on the entire sum of \$133,446.32 from December 1, 1972, until the date of payment of the \$30,057.10 balance (A510, 511, 514, 515). No pre-judgment interest was allowed on the \$105,900.00 damages awarded Garrity. Garrity moved the Court to alter or amend the judgment to exclude the award of pre-judgment interest (A518), and Piles Wonder cross-moved to include pre-judgment interest on the sum of \$2,510.78 (A523). Both motions were denied in a Memorandum Opinion signed by Judge Murphy (A525).

Statement of Facts

Garrity is a Connecticut corporation headquartered in Stamford and engaged in the mass distribution of low-cost disposable products, including flashlights, to wholesalers and retailers throughout the United States. Piles Wonder is a French manufacturer of batteries and disposable flashlights. In 1968, Garrity became the sole distributor in the United States and Canada of a disposable flashlight manufactured by Piles Wonder (A55-56). Prior to this arrangement, Piles Wonder had not sold its disposable flashlight in this market (A228-29). Over a four year period ending in mid-1972, Garrity purchased and duly paid for approximately 5,000,000 flashlights manufactured by Piles Wonder (A58, 278, 333). All flashlights purchased by Garrity were manufactured and sold under Garrity's own trademark.

From March 30 through July 3, 1972, Piles Wonder delivered 481,320 flashlights to Garrity under invoices of even dates (A577-86). The terms of payment were 120 days from the end of the month of each invoice (A109, 577-86). Piles Wonder warranted both the quality and fitness for purpose of the units delivered (A489, 491). Unknown to Garrity, many if not all of these units contained a latent defect which caused the switch to break after being turned on a variable number of times (A488-89). The defect was caused by the use of excessive amounts of inferior scrap plastic during manufacture, which resulted in low structural strength of a plastic support holding the switch spring (A219-20).

Piles Wonder began receiving complaints of this defect from its European markets in May or June 1972 (A270-71). The product Piles Wonder sold on the European market was manufactured at the same factory producing flashlights for Garrity, and the European product was identical to Garrity's but for the color and trademark (A269). Since the complaints were not received until after the flashlights were distributed out of inventory to distributors and retailers and then purchased and used by consumers (A271), it was apparent that the period of defective production began at least as early as the March 1972 delivery to Garrity. In any event, Piles Wonder instituted a worldwide recall of the flashlights marketed under its own trademark in July 1972, but not of those sold to Garrity (A242, 246). Garrity was not notified of either the defect or the recall (A246).

Uninformed of the defective production and recall, Garrity continued to ship the 481,320 defective units to its customers throughout the United States with the result that, in the summer of 1972, the normally minimal complaints and returns to Garrity from wholesalers, retailers and consumers began to increase substantially (A60-61).

Garrity promptly informed Piles Wonder of the complaints by letter dated August 25, 1972 (A532). Soon thereafter, Piles Wonder's representatives met with Garrity and acknowledged that the defect was worldwide and had been known by them for some time (A214-16). They promised to give Garrity full reimbursement for the cost, shipping expenses and customs duties of the defective units as well as to ship replacements for his inventory (A64-66, 214-16, 320).

However, a month went by without Garrity hearing further from Piles Wonder. In the meantime, Garrity was being deluged with returns from its customers (A66-67). Finally, on October 6, 1972, Garrity again wrote Piles Wonder to remind them of the promised reimbursement and replacements and to request shipment of 200,000 first quality flashlights in order to fill back orders and offer replacements for the many returns Garrity was receiving (A533). Piles Wonder immediately responded by telex dated October 10, 1972, promising to ship 100,000 newly-produced flashlights on October 31, 1972, and to credit Garrity its "true cost" for all defective units (A535). This shipment was never made (A68-69). The reason proffered was that Piles Wonder's factory continued to have difficulties in production, delaying shipment of new flashlights until December 15, 1972 (A536).

In fact, Piles Wonder never took steps to ship newly produced replacements to Garrity. Piles Wonder admitted at trial that it did not even begin production of new flashlights to ship to Garrity as replacements despite its repeated assurances that such shipments would be made (A328-29). Finally, in late November 1972, Piles Wonder reneged on its promises to credit Garrity for all defective returns and to ship first quality replacements. It offered instead to repair defective units in Garrity's inventory (A387-88), and to give a credit of only six per-

cent of certain invoices (A573, 541). As a precondition to any settlement, Piles Wonder demanded that Garrity first pay the full amount of all invoices, including the full purchase price of all defective units (A539, 336). The repair consisted of cutting an opening in the defective flashlight, inserting a stronger plastic switch support, and welding the opening (A330). The result left a clearly visible ridge on the repaired flashlight which Garrity found unacceptable for delivery to his customers in place of first-quality goods (A120-22).

The offer of a six percent credit on only some of the invoices, rather than the originally offered full credit for all defective units, was equally unacceptable to Garrity (A541). Garrity replied to the demand for full payment by reiterating its claim for reimbursement of its costs for the defective units which, though agreed to, had not been honored (A543).

In January 1973, Piles Wonder terminated Garrity's exclusive distributorship in the United States and began marketing the product under its own trademark through its subsidiary, Wonder Corporation of America (A544). At this point, Garrity had lost its normally heavy Christmas sales and was able to continue in the disposable flashlight market only through production of its own, more expensive flashlight, which had been test-marketed in the Fall of 1972 (A98, 399-400). It had suffered out-of-pocket expenses and lost profits caused by Piles Wonder's breach of warranty, and its claim for damages was mounting each day as returns from customers (to whom Garrity gave full credit) continued to flow in (A82, 533, 60-61, 92-93).

During 1973 and 1974 Garrity returned 178,954 units to Piles Wonder, representing returns from customers as well as the remaining inventory from the tainted deliveries (A139-42). By the date of trial Garrity had an addi-

tional 12,441 defective flashlights on hand which had been returned by customers, for a total of 191,395 flashlights (A143). While the parties agreed that Garrity should receive a credit of 41 cents per unit, representing the price, shipping cost and customs duties (A491-92), they disagreed as to the number of units for which credit should be received, since Piles Wonder claimed that some of the units returned by Garrity were made prior to the defective production (A309). Piles Wonder also refused to recognize Garrity's claim for lost profits, arguing that Garrity should have mitigated its damages by replacing the defective units with its own, more expensive product, by accepting repaired flashlights, or by selling from the tainted inventory (A468-72). Each of these issues of disagreement was presented to the jury (A495).

The trial court submitted written questions to the jury which included a direction to award Garrity 41 cents for each defective flashlight on which it was entitled to a credit by reason of Piles Wonder's breach of warranty (A493-94), and a direction to return a verdict for Piles Wonder in the amount of its unpaid invoices and the erroneous currency conversion item (A516-17). The number of defective units and issues of lost profits, mitigation of damages and incidental expenses were all left for the jury to determine (A516-17).

Predictably, the jury, in awarding Garrity \$65,900 as a credit for returned units and \$40,000 as lost profits, arrived at a result which was less than that claimed by Garrity (A489) but more than that conceded by Piles Wonder (A498). Thus, a balance of \$30,057.10 was found due Piles Wonder (A510). To this, however, the district court added an award of pre-judgment interest at 6% on the entire amount of the unpaid invoices, \$133,446.32, from December 1, 1972 (A510, 511) until payment of the balance. It is solely upon this award of pre-judgment interest that Garrity first moved the district court to alter or amend its judgment and now takes its present appeal.

ARGUMENT

POINT I

The District Court erred in awarding defendant pre-judgment interest on the full amount of the claim for the purchase price under the circumstances of this case.

The propriety of awarding pre-judgment interest as damages in this action is governed by the law of Connecticut, where the dealings between the parties took place. See *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 256 F.2d 946, 952 (4th Cir. 1958), *aff'd*, 359 U.S. 297 (1959); 11 *Williston on Contracts* §1412, at 620 (1968).

As the Connecticut codification of the Uniform Commercial Code (UCC) is silent on the issue of interest on a claim for breach of a sales contract, general contract law as to damages applies. See 2 *Anderson Uniform Commercial Code* § 2-710:5 (2d ed. 1971). Section 37-3a of the *Conn. Gen. Stat. Ann.* (Supp. 1977) provides that "[i]nterest at the rate of six per cent a year . . . may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . ." Connecticut precedent examining awards of pre-judgment interest, although placing such awards within the discretion of the trial court, reveals that interest is a proper measure of damages only under circumstances where money due is wrongfully withheld. Where money has been rightfully withheld, as where the contract creditor himself has breached the contract, no interest is payable on the amount properly withheld in consequence of the creditor's breach. Illustrations of the operation of the rule are found in three recent decisions of the Connecticut Supreme Court.

In *Cecio Brothers, Inc. v. Feldman*, 161 Conn. 265, 287 A.2d 374 (1971), plaintiff contractor sued defendant owner on a balance due for materials sold and delivered and services rendered. Defendant counterclaimed for damages arising from plaintiff's allegedly defective performance. The trial court found for plaintiff on all counts, and awarded interest on the amount awarded plaintiff from the date it was due. In affirming the award of interest, the Supreme Court of Connecticut first noted that "the plaintiff performed his work in a good and workmanlike manner and . . . sold and delivered materials . . . in accordance with an express agreement. . . ." 287 A.2d at 379. Articulating a broad rule as to an award of interest, the court stated that "the real question in each case is whether the detention of the money is or is not wrongful under the circumstances". *Id.* Having concluded that the plaintiff was not in breach in his performance under the contract, the court found that the defendant wrongfully detained money due the plaintiff and awarded interest on the full amount. Thus, in the present case, had Garrity recovered no damages for Piles Wonder's breach of warranty, the unpaid amounts on the invoices would have been wrongfully detained and Piles Wonder might properly have been awarded interest.

Applying the *Cecio Brothers* rationale, the same court reached a different result in *Bertozzi v. McCarthy*, 164 Conn. 463, 323 A.2d 553 (1973). There, a vendor sued the purchasers of a house for the balance due on the sales contract. The purchasers counterclaimed for damages caused by plaintiff's defective construction of the house. The trial court found for plaintiff on the complaint and for defendants on their counterclaim, awarding interest to neither party. On appeal, plaintiff argued that interest should have been awarded on the balance due. In affirming, the court noted that the amounts due on the complaint

and the counterclaim were unliquidated, and stated that whether a sum has been liquidated is a useful, although not controlling, criterion for allowance of interest. 323 A.2d at 555-56. Having determined that the contract creditor failed to fulfill his obligation under the contract, and that he was at least in part responsible for defendants' refusal to pay the balance due on the contract, the court found that the defendants had not wrongfully deprived the plaintiff of a sum of money. Thus, the plaintiff was not entitled to interest even on the balance due. Application of this rationale to the issue Garrity raises on appeal, where Garrity's withholding of payment on Piles Wonder's invoices was prompted by Piles Wonder's breach of warranty as to the very goods covered by those invoices, mandates reversal of any award of interest in this case.

Virtually identical to *Bertozzi* is *Southern New England Contracting Co. v. Connecticut*, 165 Conn. 641, 345 A.2d 550 (1974). Plaintiff contractor sued the State for breach of a construction contract, the State counterclaiming for damages for delay in construction. Both claims prevailed, and no interest was awarded. On appeal, the plaintiff contended that it was entitled to interest on the damages recovered from the date such money was due. The court disagreed and affirmed. Citing the *Cecio Brothers* and *Bertozzi* cases, *supra*, the court framed the question as "whether the interests of justice require the allowance of interest as damages for the loss of use of money." 345 A.2d at 560. In negatively determining this question, the court considered the following factors: that the sum due could not have been determined by due inquiry and investigation on the due date, that liability and damages were "hotly disputed," and that issues were eventually determined for both parties. *Id.* at 561. Each of these factors was present in the case at bar: the sum due Piles Wonder,

after deduction of Garrity's damages, was not determined until the jury rendered its verdict at trial; Piles Wonder hotly disputed both its liability for breach of warranty and the amount of damages suffered by Garrity as a result of that breach; and, as evinced by the verdict and judgment in this case, issues were eventually determined for both parties. Yet the trial court awarded interest not only on the balance ultimately found due Piles Wonder after deduction of Garrity's damages, but on the entire amount of Piles Wonder's invoices.

The underpinnings of the recent pronouncements of the Supreme Court of Connecticut on the award of pre-judgment interest may be found in two cases, *Healy v. Fallon*, 69 Conn. 228, 37 A. 495 (1897), and *Tucker v. Jewett*, 32 Conn. 563 (1865), both of which further indicate that the award of interest in this case should be reversed. In *Healy*, a plaintiff contractor sued for the unpaid price of \$1,525.00. Defendant counterclaimed for \$50.00 damages caused by plaintiff's breach in construction. Computing pre-judgment interest, the lower court first deducted the amount of defendant's damages and awarded interest only on the balance due plaintiff. The Supreme Court of Connecticut affirmed, reasoning:

"the court did not err in allowing interest to the date of judgment *after deducting the damage caused by the deviations from the contract*. . . . Defendants owed the plaintiff, after deducting the damages caused by the deviation from the contract, the sum of \$1,475, . . . this sum should have been paid [with] added interest to the date of judgment. . . ." 69 Conn. at 235 (emphasis added).

In *Tucker, supra*, an action based on a bailment, the defendant asserted by way of setoff an indebtedness of the plaintiff to him. The lower court found for plaintiff,

awarding pre-judgment interest on the entire amount plaintiff claimed, then deducted the defendant's setoff without any interest, precisely as the trial court did in the present case. The Supreme Court of Connecticut reversed, stating:

"It is very clear that the court should have made an application in this [plaintiff's] indebtedness to take effect from the time when it was so found to be applicable. . . ." 32 Conn. at 564.

From the foregoing authority it is manifest that, although an award of pre-judgment interest lies within the trial court's discretion, where conflicting claims arising from the same contract are presented by the parties and both prevail, either no interest should be awarded, or at best interest only on the balance ultimately found due should be awarded. See 5 *Corbin on Contracts* §1051, at 308 (1964) ("If the buyer's counterclaim [is] one for unliquidated damages for defects in the goods sold to him the amount of this claim after determined by the court would be subtracted from the seller's total claim, and interest would be allowed only on the balance so found.") In *Tucker, supra*, where interest was awarded on the entire amount of one claim without deduction of the conflicting claim, the Supreme Court of Connecticut reversed the award of interest. In this regard, the case of *L. Albert & Son v. Armstrong Rubber Company*, 178 F.2d 182 (2d Cir. 1949), where then Chief Judge Learned Hand applied Connecticut law in reversing a decision on pre-judgment interest under the Uniform Sales Act, is instructive. *Albert* was a suit by a seller for the price of goods sold and delivered, in which the buyer counterclaimed for damages caused by the seller's breach. The District Court of Connecticut denied the buyer's claim and allowed the seller's, but without interest. The court modified the deci-

sion to allow interest on the seller's claim, as well as allowing the buyer's claim plus interest from the time the buyer notified the seller of his breach. Thus, by granting interest on both the buyer's and seller's claims, the court in effect modified the district court decision so that prejudgment interest was allowed only on the balance ultimately found due. *Id.* at 191.

Another cogent reason for reversing the award of interest in this case may be found in *Conn. Gen. Stat. Ann.* §42a-2-717, UCC 2-717, which provides:

"The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract."

This section clearly entitles a buyer to withhold payment of the purchase price to satisfy his damages caused by the seller's breach and to raise a breach of warranty in diminution or extinction of a seller's claim for the price. *See, e.g., American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 460 (S.D.N.Y. 1976); *Buff v. Giglio*, 124 N.J. Super. 94, 304 A.2d 771 (App. Div. 1973); *Vitromar Piece Dye Works v. Lawrence of London, Ltd.*, 119 Ill. App. 2d 301, 256 N.E.2d 135 (Ill. App. 1969). Indeed, UCC 2-717 has been relied upon to award pre-judgment interest only on the net amount found owing where conflicting claims for the purchase price and breach of warranty are raised, *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973), or to deny pre-judgment interest altogether, *Hussey Metals Div. v. Lectromelt Furnace Div.*, 417 F. Supp. 964, 969 (W.D. Pa. 1976).

In examining the notice requirement of UCC 2-717, one of the Official Comments thereto affords some insight:

"The buyer, however, must give notice of his intention to withhold all or part of the price if he wishes

to avoid a default within the meaning of the section on insecurity and the right to assurances [§2-609]. In conformity with the general principles of this Article, no formality of notice is required and any language which reasonably indicates the buyer's reason for holding up his payment is sufficient." UCC 2-717, Official Comment 2.

Pursuant to this section, which was brought to the attention of the District Court in both Plaintiff's Trial Memorandum of Law, page 15, and Plaintiff's Requests to Charge, number 17, Garrity was clearly entitled to withhold payment on the invoices in question. First, Garrity's original claim for damages for breach of warranty exceeded the amount due on the invoices (A13-16, 51, 438). Second, these invoices, dating from March 30, 1972, to July 3, 1972, covered deliveries of defective lights (A91-92, 270-71, 309, 322-23, 489). Third, Garrity gave Piles Wonder notice reasonably indicating that its reason for non-payment was Piles Wonder's failure to provide reimbursement of Garrity's costs and replacement units as promised (A88-89, 532, 533). To award Piles Wonder interest on the total unpaid amounts of its invoices covering defective goods as money "wrongfully withheld," which the district court did here, is to render UCC 2-717 meaningless.

It is manifest that, under the foregoing authorities and the verdict of the jury, Garrity did not wrongfully withhold the payment due so as to afford a basis for the award of interest under Connecticut law. The invoices covered flashlights admittedly defective in breach of Piles Wonder's warranty (A489, 309). Indeed, the district court directed the jury to find that Piles Wonder had breached its warranty and to return a verdict for Garrity of 41 cents for each defective flashlight (A433, 493-94). Thus, by failing to fulfill its obligation under the contract, Piles

Wonder was responsible by reason of its own breach for Garrity's refusal to pay the invoices. As indicated above, Garrity was entitled under *Conn. Gen. Stat. Ann.* §42a-2-717 (1972), UCC 2-717, to deduct its damages from the unpaid invoices. The balance due, if any, could not have been determined by inquiry and investigation on the due date since the precise amount of plaintiff's damages caused by the defective flashlights was not ascertainable at that time. Because the defect was latent, the actual number of defective flashlights was not, and could not have been, determined for many months. Liability and damages were "hotly disputed" between Garrity and Piles Wonder, and issues were eventually determined at trial for both parties. Under the circumstances, and in light of Piles Wonder's breach, it cannot be said that Garrity wrongfully deprived Piles Wonder of the balance of \$30,057.10 ultimately found due at trial. *A fortiori*, the district court's award of pre-judgment interest on the entire amount of the invoices, \$133,446.32, while denying any interest on the damages awarded for breach of warranty, \$105,900, was clearly erroneous under Connecticut law. Piles Wonder, a seller which breached its warranties, should not be awarded any pre-judgment interest in this case. At the least, such interest should be applied only to the balance found due by the jury of \$30,057.10.

POINT II

The award of interest should be reversed as an abuse of discretion.

The rule of law in Connecticut, examined in Point I of this brief, allows an award of interest in the trial court's discretion when money due has been wrongfully withheld. Implicit in this rule is that in order for the trial court to exercise its discretion in this regard, the money found due

must have been wrongfully withheld. The use of the word "discretion" should not prevent this Court from reviewing the facts and the law to determine whether the award of interest was an abuse of discretion. See, e.g., *Board of Comm'rs v. United States*, 308 U.S. 343 (1939); *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976) (attorneys' fees); *Royce Chem. Co. v. Sharples Corp.*, 285 F.2d 183 (2d Cir. 1960) (pre-judgment interest); *L. Albert & Son v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949) (pre-judgment interest). As the United States Supreme Court has noted,

"The term 'discretion' . . . when invoked as a guide to judicial action, . . . means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but in regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Lagnes v. Green*, 282 U.S. 531, 541 (1931).

The Supreme Court of Connecticut has embraced the following definition:

"Discretion means 'a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. In a plain case, this discretion has no office to perform and its exercise is limited to doubtful cases, where an impartial mind hesitates. If it be doubted whether the excuse offered is sufficient or not, or whether the defense set up is with or without merit in foro legis, when examined under those rules of law by which Judges are guided to a conclusion, the judgment of the Court below will not be disturbed.'" *Hammerberg v. Leinert*, 132 Conn. 596, 46 A.2d 420, 424 (1946) (denial of injunction reversed as an abuse of discretion).

The same court later expounded on the above definition, noting that "[a]s the discretion which the court is called upon to exercise is not an absolute but a legal one, we will upon appeal set aside its action when it appears that there was a misconception on its part as to the limits of its power. . . ." *E.M. Locw's Enterprises v. Surabian*, 146 Conn. 608, 153 A.2d 463, 464 (1959) (affirming grant of new trial).

As noted above, the law of Connecticut entrusts an award of pre-judgment interest in the trial court's discretion when money due has been wrongfully withheld. Rather than examining whether Garrity wrongfully withheld payment to Piles Wonder, a question resolved in Garrity's favor by the jury's verdict, the trial court apparently based its decision upon its own view that Garrity was slow to pay its bills. In its memorandum opinion denying Garrity's post-trial motion to amend the judgment the trial court said:

"We got the impression during trial that the plaintiff's principal officer had a distaste for the payment of money (he was described as a slow payer) . . . it is only meet and proper that interest be awarded on such a past due debt to compensate a creditor for the loss of the use of such an amount of money." (A526).

This statement suggests that the trial court believed that Garrity withheld payment not because it had suffered substantial damages which offset the amount due, but simply because it preferred not to pay. This clearly was a question for the jury to decide, which it did by awarding Garrity damages in the amount of \$105,900. Moreover, there was precious little basis for the trial court's "impression" in the evidence. While an officer of Piles Wonder made a gratuitous comment that Garrity was "mostly

late" in its payments (A321), it was uncontroverted at trial that the invoices on the 5 million units delivered during the four years prior to the present dispute were all duly paid (A59, 118, 278, 333).^{*} Whether or not Garrity was a "slow payer" in the past is irrelevant, however, to the question pertinent under the law of Connecticut to an award of interest in this case, *i.e.*, whether Garrity wrongfully withheld the payment due on the invoices at issue in this case. Insofar as the invoices covered goods defective in breach of Piles Wonder's warranty, under the law of Connecticut Garrity did not wrongfully withhold any money due, and there was no room for the district court to exercise its discretion to award pre-judgment interest. Thus any award of interest, particularly in light of Garrity's damages of \$105,900 for breach of warranty which arose from the very transaction for which Piles Wonder sought payment, should be reversed as a clear abuse of discretion.

There is no precedent in Connecticut law which supports the district court's award of interest in this case. To the contrary, the Connecticut cases cited in Point I of this brief all call for reversal. *Cecio Brothers, supra*, allowed interest on the plaintiff's claim when "plaintiff performed his work in a good and workmanlike manner and . . . sold and delivered materials . . . in accordance with an express agreement. . . ." 287 A.2d at 379. Here, Piles Wonder breached its warranty by delivering defective goods. In *Bertozzi* and *Southern New England, supra*, where the party claiming interest was also in breach of contract, no interest was awarded. Here, although Piles Wonder breached its warranty, the district court nonethe-

^{*} Moreover, it was undisputed at trial that Garrity duly paid for all batteries delivered by Piles Wonder during the period in which the dispute over the defective flashlights arose (A340-42, 400-1, 483).

less awarded interest. *Healy, Tucker, and Albert, supra*, clearly state that where countervailing claims each prevail, interest is properly awarded only on the balance found due, *Tucker* reversing an award of interest on this very point. Here, the district court awarded Piles Wonder interest not on the balance ultimately due it, but on the entire amount of the purchase price. UCC 2-717 clearly gives an aggrieved buyer the right to withhold from the purchase price any damages it suffers in consequence of a seller's breach, yet here the district court, by awarding interest on the full amount of the invoices as money wrongfully withheld despite the damages awarded Garrity for breach of warranty, read this section out of the Uniform Commercial Code. Although a party may not recover pre-judgment interest when by its own act it is responsible for the non-payment, 5 *Corbin on Contracts* §1050, at 304-05 (1964); Comment, *Interest as Damages in Connecticut*, 30 Conn. B.J. 407, 409 (1956), here, although Piles Wonder's breach of warranty caused Garrity's nonpayment, pre-judgment interest was nevertheless awarded.

Under these circumstances, the lower court's exercise of discretion should be reversed.

CONCLUSION

For all of the foregoing reasons, the award of prejudgment interest by the court below was error, and the case should be reversed and remanded with instructions to strike the award of interest on the sum of \$133,446.32 from the judgment.

March 1, 1977

Respectfully submitted,

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